UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In The Matter of:

RIS INVESTMENT GROUP, INC.,

Debtor.
_____/

Case No. 03-31902-BKC-SHF
Chapter 7 Proceeding

MEMORANDUM OPINION DENYING THE MOTION OF INDIAN SPRING COUNTRY CLUB, INC. TO DISMISS CHAPTER 7 BANKRUPTCY CASE OR TO ABSTAIN

THIS MATTER came before the Court on July 23, 2003, upon the Motion of Indian Spring Country Club, Inc., To Dismiss Chapter 7 Bankruptcy Case Or To Abstain, filed by Indian Spring Country Club, Inc. ("Indian Spring"), seeking to dismiss the Chapter 7 case of RIS Investment Group, Inc. ("Debtor") pursuant to 11 U.S.C. §707(a), or in the alternative, seeking to have the Court abstain from hearing this case pursuant to 11 U.S.C. §305(a). The Debtor filed a response to the Motion and Indian Spring filed a Reply Brief. Prior to the hearing, the parties filed a Stipulation of Uncontested Facts (C.P. 21) and Indian Spring filed a number of exhibits which were admitted without objection. The Court heard the testimony of the Debtor's President , Leonard Greenberg, the Trustee's counsel, John Walsh, and state court counsel for the Debtor, Adam Rabin. The Court, having reviewed the testimony and evidence presented, considered the arguments of counsel and being otherwise fully advised in the premises, **denies** the Motion to Dismiss Chapter 7 Bankruptcy Case or to Abstain.

This case was commenced with the Debtor's filing of its voluntary chapter 7 Petition on April 15, 2003. Patricia Dzikowski is the Chapter 7 Trustee. In 1984, the Debtor purchased the Indian Spring development from Cadillac Fairview, a real

estate developer. At that time, there were 2500 units planned for this community with approximately 900 units constructed. The Debtor bought the remaining property and the country club from Cadillac Fairview and proceeded to complete the development of the property. In addition to the home sites, the property consisted of a country club building, two 18-hole golf courses, 20 tennis courts, a pool, additional dining facilities, office facilities and golf property and equipment. The Debtor, subject to a January 4, 1988, Agreement to Turnover, turned over the country club assets to Indian Spring Country Club in 1994. At the time of the turnover, the Debtor still owned additional developable property in Indian Spring.

In 1994, Indian Spring commenced an action in the Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, Case No. CL 94-5025-AO, alleging causes of action for breach of contract and breach of warranty relating to the construction, design, and maintenance of the club (the "Construction Litigation"). This litigation remains pending.

During the years since the commencement of the state court litigation, the Debtor continued to develop its remaining real property in Indian Spring and also during that time developed, via a partnership, some real property at a country club in Boca Raton called Boca Grove. The Boca Grove partnership was with a company known as Harris Boca Grove Limited owned by Robert Mufson. Mr. Mufson passed away several years ago and at that time the Debtor purchased out Mr. Mufson's interest in the remaining properties in Boca Grove and sold them off.

On or about May 2, 2001, Indian Spring commenced a second action against the Debtor and its principal shareholder, Leonard Greenberg, seeking damages for fraudulent conveyances of property and to pierce the Debtor's corporate veil. This case is styled Indian Spring Country Club, Inc. v. RIS Investment Group, Inc. f/k/a

The Resort at Indian Spring, Inc. and Leonard Greenberg, Case No. CA 01-4674-AO (Fifteenth Judicial Circuit of Florida, in and for Palm Beach County) (the "Fraudulent Conveyance Litigation"). The Debtor and Leonard Greenberg dispute the claims set forth in the Fraudulent Conveyance Litigation. This second action has been stayed pending resolution of the matters pending in the Construction Litigation.

The Debtor's principal, Leonard Greenberg, is 76-1/2 years old. During the litigation with Indian Spring, Albert Proujansky, an in-house attorney and trusted advisor to Mr. Greenberg for 16 years, actually handled the litigation for the Debtor. During this entire litigation, Mr. Greenberg has been a resident and continues to be a resident at Indian Spring and is, in fact, a member of the Indian Spring Country Club, which is the movant in this case.

Mr. Greenberg testified that the Debtor has spent over $750,000 in attorney's fees defending the original Construction Litigation. The litigation has been the subject of three mediations, none of which have been successful. In December, 2001, Mr. Proujansky passed away at the age of 86. Mr. Greenberg testified that because of the loss of Mr. Proujansky, he asked his attorneys to request one additional mediation which occurred in March, 2003, and which was not successful. At that time, and with the construction litigation set for trial commencing April 21, 2003, Mr. Greenberg sought the advice of bankruptcy counsel and placed the Debtor into Chapter 7 bankruptcy on April 15, 2003. According to Mr. Greenberg, this Chapter 7 case was filed by the Debtor because of the disputed pending claim of Indian Spring and because the Debtor could no longer afford to continue litigation of the Construction Litigation with Indian Spring Country Club.

The schedules filed by the Debtor (Exhibit 4) reflect the ownership of a 1.47 acre parcel of property located at Indian Spring Country Club, having an alleged

value of $200,000. In addition, the schedules reflect $39,934.30 in a bank account of the Debtor and an account receivable due from PBC Holdings, Inc., an insider of the Debtor, in the amount of $45,411.18. Equipment and office furnishings are scheduled with a value of $2,555.00.

Mr. Greenberg testified that PBC Holdings, Inc. was now in a position to pay the receivable and, in fact, will be shortly paying the Trustee the $45,411.18. The Trustee's counsel, John Walsh, testified that the Trustee had received the funds from the bank account, had received books and records from the Debtor as requested, and had received complete cooperation from the Debtor in the administration of this case. The real property is partially occupied by another company owned by Leonard Greenberg, which is paying the Trustee rent for the use of the property, pending resolution of this Motion and liquidation of the property. An amount equal to approximately $20,000 per year is being paid as rental, which rental is being received by the trustee, and the Debtor placed a value on this property of $200,000.

The schedules of the Debtor reflect that there exist no secured or priority claims, and that the only unsecured claims consist of (i) $25,193.00 due to Ackerman, Link and Sartory, Debtor's pre-petition counsel; (ii) $10,000,000 as a disputed claim of Indian Spring; and a (iii) contingent claim of Wachovia Bank of $44,100. On April 8th and 9th, the Debtor transferred two Cadillac automobiles and a Toshiba copier to PBC Holdings, Inc. Mr. Greenberg testified that the automobiles and copier were transferred in order to assure that the vehicles and copier would not be part of the Debtor's bankruptcy estate. The two vehicles were used by Mr. Greenberg and his wife for business purposes, and Mr. Greenberg expressed a

desire to retain possession of the vehicles in the hope of purchasing the vehicles from the trustee.

The Motion to Dismiss under §707(a)

Indian Spring Country Club seeks dismissal of this case under 11 U.S.C. §707(a), which states as follows:

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including–
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> (1) unreasonable delay by the debtor that is prejudicial to creditors;
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> (2) nonpayment of any fees and charges required under chapter 123 of title 28; and
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> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

None of the grounds for dismissal under sub-sections (1), (2) and (3) of §707(a) are present in this case. The Court must look to the words "for cause" contained in §707(a) to determine whether or not there are legal grounds to dismiss a corporate chapter 7 bankruptcy under these circumstances. The case law differs as to whether or not §707(a) sets forth a good faith filing requirement.

There are three lines of cases pertinent to this Court's analysis with regard to whether a good faith filing requirement (GFFR) exists under chapter 7. The first line of cases clearly states that there is no GFFR for filing a chapter 7 petition. In re Padilla, 222 F.3d 1184 (9th Cir. 2000); In re Etcheverry, 242 B.R. 503 (D. Colo. 1999). The second line of cases holds that a case may be dismissed for bad faith in extremely limited circumstances where manifest dishonesty toward the legal tribunal is present. In re Zick, 931 F.2d 1124 (6th Cir. 1991). The Zick court held:

> Dismissal based on lack of good faith must be undertaken on an ad hoc basis. It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish life-style, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence."

The third line of cases holds that, although certain actions of a debtor constituting cause may also be characterized as bad faith, "framing the issue in such terms [bad faith]"may tend to misdirect the inquiry away from the fundamental principles and purposes of Chapter 7."" In re Bilzeran, 258 B.R. 850 (Bankr. M.D. Fla. 2001) (quoting Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829 (8th Cir. 1994); In re Motaharnia, 215 B.R. 63 (Bankr. Cal. 1997). The Motaharnia court held that bad faith constitutes "cause" only in the egregious situation where the debtor's motives for filing the chapter 7 petition are inconsistent with the established purpose of the Bankruptcy Code.

This Court is persuaded by the first line of cases and holds that there is no implicit GFFR under 707(a). Although many courts have held that such a GFFR exists in Chapter 11 and 13 cases, "[w]hat distinguishes Chapter 11 and 13 from Chapter 7 is the language of the Bankruptcy Code itself and the post-filing relationship between the debtor and his creditors." In re Padilla, 222 F.3d at 1193. Chapter 11 and 13 specifically delineate a good faith requirement for proposed payment plans. *Id.* at n3 (citing 11 U.S.C. 1112(b); 11 U.S.C. 1307(c)). Chapter 7 makes no mention of a good faith requirement. Further, the relationship between debtor and creditor in Chapter 11 and 13 is significantly different than their relationship in Chapter 7. *Id.* at 1193. Chapter 11 and 13 debtors are allowed to

continue in possession of their assets and alter their contractual relationship with their creditors. *Id.* Chapter 7, on the other hand, ends the debtor-creditor relationship when the debtor metaphorically " throws in the towel." So long as the debtor is willing to surrender all of its assets, regardless of whether debtor's motive was grounded in good faith, the debtor is entitled to Chapter 7 protection. *Id.* (citing Katie Thein Kimlinger and William P. Wassweiler, *The Good Faith Fable of 11 U.S.C. S 707(a): How Bankruptcy Courts have Invented a Good Faith Filing Requirement for Chapter 7 Debtors,* 13 Bankr. Dev. J. 61, 65 (1996)).

The Court acknowledges that the first line of cases deals exclusively with consumer liquidations. The Court is also aware of conflicting case authority dismissing a case as having been filed in bad faith, wherein the debtor, a corporate chapter 7 debtor had been involved in a two- party dispute which was partially adjudicated in state court pre-petition. In re Ripley and Hill, P.A., 176 B.R. 596. (Bankr. M.D. Fla. 1994). Essential to that court's holding, however, was a balancing test which weighed the benefit and harm to the debtor and creditor. *Id.* 598-599. The court held that since debtor could receive no discharge, and would be in the same situation upon emerging from its chapter 7 case, it would receive no benefit from continuing the chapter 7 proceeding. *Id*. To the contrary, the court concluded that the creditor would be harmed by the delay caused by the automatic stay of the state court proceeding. *Id.* The court held that these factors weighed in favor of dismissing the case.[1] Even if this Court were to agree with the holding in Ripley and Hill, P.A. that § 707(a) contains a GFFR and applied the balancing test used in that

[1]Also significant to the Ripley court was that the debtor has absolutely no assets to distribute and only one creditor. Therefore, there was no issue as to the fair and orderly distribution of assets. In the present case, the debtor does have assets to distribute and, though with substantially lesser claims, there are other creditors involved.

case, the facts of the instant case weigh in favor of denying Indian Spring's motion to dismiss.

Sub judice, at the time of the filing of the bankruptcy, the Debtor's assets consisted of a bank account containing $39,934.30, an account receivable in the amount of $45,411.18, real property worth approximately $200,000 and potential causes of action against the Debtor's shareholders for transfers that occurred in previous years. According to Adam Rabin, the Debtor's state court counsel, if the Constructing Litigation had proceeded to trial, it would have cost the Debtor approximately $150,000 to $200,000, funds which the Debtor did not have.

Had the Debtor continued with its defense of the lawsuit and used its remaining cash and accounts receivable to pay its attorneys, and also, had the Debtor sold its real property to generate additional funds to fund its defense of the lawsuit, the creditors likely would be complaining that the Debtor's officers did not act in the best interests of the Debtor, and instead wasted the Debtor's resources on legal fees. In this case, after ten years of litigation, four sets of attorneys, three mediations, the death of the in-house counsel who was coordinating the Debtor's defense, and when the face value of Debtor's assets had dwindled to approximately $300,000, the corporate officers made the decision to file this chapter 7 proceeding. Applying the balancing test used in Ripley , the benefit to creditors weighs in favor of allowing this case to remain pending, to be administered by the chapter 7 trustee.

The Court is aware of two opinions involving the dismissal of a chapter 7 corporate debtors wherein the cases were dismissed "for cause" as set forth in §707(a). Both cases involve factual circumstances in oppossite to the situation at hand. In the case of In re Commercial Oil Service, Inc., 58 B.R. 311 (N.D. Ohio 1986) the chapter 7 debtor held, as its sole asset, real property that was severely

environmentally polluted. Pre-petition, the State of Ohio initiated action against the Debtor resulting in the issuance of injunction regarding the enforcement of certain environmental laws. The Debtor sought bankruptcy protection to avoid the effect of these injunctions. The trustee in bankruptcy moved to dismiss the case and was joined in the motion by the State of Ohio Environmental Protection Agency. The court dismissed the case on the basis that it was deemed important to the public health, safety and well-being of the community to place the environmentally contaminated property back under the control of the state court, as the trustee in bankruptcy could not manage the site of the contaminated property or comply with state law. The bankruptcy court further noted that this was not a case where assets could be liquidated, claims adjudicated and a distribution made, but was an on-going environmental nuisance which threatened the health, safety and well-being of the people who surround it.

> The reasons which constitute "cause" under §707 include the health, safety and welfare of the public, the lack of experience of the court and the Trustee in cleaning up hazardous wastes, the delay and expense of adding a Bankruptcy case to the Federal and State court actions, and finally that any possible distribution to creditors would be inconsequential thus making administration of the case an exercise in futility.

Id. at page 318.

Another decision wherein a chapter 7 corporate debtor was dismissed as having initiated a case in bad faith is In re Addon Corporation, 231 B.R. 385 (N.D. Ga. 1999). In this case, the debtor's sole asset consisted of its rights as a tenant under a lease of office space. It then sub-leased the space to two bankruptcy attorneys. The debtor failed to pay the rent to the landlord, and the landlord terminated the lease pre-petition and sought eviction. On the day of the eviction,

one of the bankruptcy attorneys/sub-lessees filed the debtor's bankruptcy petition seeking to invoke the automatic stay to stop the eviction. The court sanctioned the attorneys who filed the case, finding that the filing was prompted only to delay the eviction action. The court found that the debtor had no assets, no employees and no creditors, other than the landlord's eviction claim. The lease had terminated pre-petition, so no tenancy even existed as of the petition date. The court found that the filing of the case was for an improper purpose, and was an abuse of the bankruptcy system. A key distinguishing factor between Addon Corporation and this case is that *sub judice*, this case was not filed to forestall creditor action, but rather, in acknowledgement of the futility of the Debtor's financial plight. Absent such factors as a severe threat to public health, or an abuse of the legal process, a voluntary chapter 7 business case should not be dismissed, pursuant to 11 U.S.C. § 707(a).

Indian Spring also sought to have this Court abstain from adjudicating this matter under 11 U.S.C. § 305(a). This Court determines that, for the reasons stated above, abstention would be inappropriate. Accordingly it is

ORDERED that the Motion to Dismiss Chapter 7 Case, and the Motion to Abstain, filed by Indian Spring Country Club, Inc. are **denied**.

ORDERED in the Southern District of Florida on this 17th day of September, 2003.

STEVEN H. FRIEDMAN
United States Bankruptcy Judge